Date: December 18, 1997

Case No.: 96-INA-00041

In the Matter of:

L.D.C., INC.,
Employer

On Behalf Of:

MALGORZATA GRADOWSKA,
Alien

Appearance: Dennis A. Maycher, Esq.
For the Employer/Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 1, 1994, L.D.C., Inc. ("Employer") filed an application for labor certification to enable Malgorzata Gradowska ("Alien") to fill the position of Production Supervisor (AF 7). The job duties for the position are:

> Supervise and coordinate activities of workers engaged in the manufacturing of clothing. Supervise work schedule. Inspect clothing to verify that they meet the specifications. Supervise productivity and work flow.
>
> The only requirement for the position is two years of experience in the job offered.

The CO issued a Notice of Findings on June 23, 1995 (AF 63-65), proposing to deny certification on the grounds that the Employer rejected U.S. applicants Richard K. Jeffrey, Brian R. Manna, Mohamed Deen, and Stanley Zwier for other than lawful, job-related reasons in violation of 20 C.F.R. §§ 656.24(b)(2)(ii), 656.21(b)(6), and 656.20(c)(8). The CO also found that the Employer had not documented that U.S. applicants Jeffrey, Manna, and Zwier were recruited in good faith, in violation of § 656.20(c)(8). The Employer was notified that it must document its good-faith recruitment of lawful rejection of these U.S. applicants.

In its rebuttal, dated July 13, 1995 (AF 66-78), the Employer contended that it made timely contact with all U.S. applicants by certified mail, and that all U.S. applicants were rejected for either not possessing the required experience, or for failing to respond to their certified letters scheduling them for interviews. The Employer provided copies of its certified mail return receipts.

The CO issued the Final Determination on July 27, 1995 (AF 79-82), denying certification because the Employer failed to adequately document that it made timely contact and lawfully rejected U.S. applicants Richard Jeffrey, Brian Manna, Stanley Zwier, and Mohamed Deen in violation of §§ 656.24(b)(2)(ii), 656.21(b)(6), and 656.20(c)(8).

On August 30, 1995, the Employer requested review of the denial of labor certification (AF 83-110). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche, Ent. Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified, and available" to perform the work. 20 C.F.R. § 656.1.

Failure to timely contact the U.S. applicants indicates a failure to recruit in good faith. An employer must make efforts to contact qualified U.S. applicants in a timely fashion after the receipt of resumes from the state job service agency. "As soon as possible" is the standard for timely contact. This standard does not embody a set time limit, and weighs all relevant factors, including requirements of the position, whether the recruitment is local, and the number of persons applying for the position. *Loma Linda Foods, Inc.*, 89-INA-289 (Nov. 26, 1991) (en banc). See also *Flamingo Electroplating, Inc.*, 90-INA-495 (Dec. 23, 1991). Delays in contacting the applicants of 16 and 17 days from the receipt of the resumes have been found to evidence a lack of good-faith recruitment where the position was local, there was a small number of applicants, and the job required limited credentials. *Com-Spec Properties*, 91-INA-283 (Dec. 2, 1992); *Gabriel Rubanenko, M.D., Inc.*, 92-INA-370 (Dec. 22, 1993). An unjustified delay in contacting the U.S. applicants, when it was feasible to contact the applicants earlier, is presumed to contribute to an applicant's unavailability. *Creative Cabinet and Store Fixture*, 89-INA-181 (Jan. 24, 1990) (*en banc*).

In this case, the Employer contends that U.S. applicants Jeffrey, Manna, and Zwier were not rejected because of their lack of qualifications, but were rejected solely because they failed to respond to the Employer's certified letter (AF 77). Applicants Jeffrey and Manna signed their return mail receipts, but applicant Zwier's letter was returned by the Post Office (AF 80). The Employer had the phone numbers of these individuals, including applicant Zwier. Reasonable efforts to contact qualified U.S. applicants may require more than a single type of attempted contact. *Diana Mock*, 88-INA-225 (Apr. 9, 1990).

In the case of applicant Zwier, whose certified mail was returned by the Post Office, there is no evidence that he had any knowledge that he was being considered for the position. *Divinia M. Encina*, 93-INA-220 (June 15, 1994). As the Employer made only one attempt to contact Zwier, and had the means to make additional contact, we find the CO's denial of labor certification for this reason alone was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.